BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT EUGENE ORANGE Claimant VS. **CEREAL FOOD PROCESSORS, INC.** Respondent AND **TRAVELERS INDEMNITY COMPANY OF AMERICA** Insurance Carrier	)	Docket No. 1,044,973

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 12, 2010, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. Brian D. Pistotnik, of Wichita, Kansas, appeared for claimant. Sylvia B. Penner, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered a new injury and that his left knee condition is not a natural and probable consequence of his previous claim in Docket No. 1,032,721.[1] Accordingly, the ALJ ordered respondent to pay claimant temporary total disability benefits from December 15, 2009, through February 15, 2010.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 18, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

[1] Docket No. 1,032,721 was settled but with medical left open. P.H. Trans. at 5. It is not known whether medical treatment is also being pursued in Docket No. 1,032,721. Regardless, this appeal only pertains to Docket No. 1,044,973. The two claims were not consolidated for hearing.

ISSUES

Respondent asserts that the medical evidence and testimony of the claimant show that claimant's disability is a natural and probable consequence of his earlier traumatic injury.

Claimant argues that he has met his burden of proving that repetitive work duties he performed from January 1, 2009, to present have caused work related injuries to his left knee.

The issue for the Board's review is: Did claimant meet his burden of proving that repetitive work duties he performed from January 1, 2009, to present have caused work related injuries to his left knee, or is his left knee condition a natural and probable consequence of his earlier traumatic injury?

FINDINGS OF FACT

Claimant has worked as a miller at respondent since February 9, 1990. He injured his right knee on October 10, 2006, when he bumped it on a roller. He settled his workers compensation claim for the right knee injury on August 27, 2008. The settlement was a settlement of all issues, but future medical was left open. Claimant continued to work at respondent during that time. Claimant said that when he settled the claim on his right knee in 2008, he was still having some pain in his right knee and also had pain in his left knee.

Claimant testified that after August 2008, both his right and left knees worsened as he performed his regular duties as a miller. He testified that because he favored his right knee, he put most of his weight on his left. He did not suffer a single traumatic event in which he injured his left knee. He testified:

> No, I ain't going to say I did no–like bump it. Like I said, like the job, you do lots of stuff, so I ain't bumped it like I did the right, I just know I was putting all my weight on that knee and after a while it just–I guess I did the same thing to the right knee, it just wouldn't handle it all, you know . . . .[2]

Claimant testified that he is on his feet constantly at work, and his job requires him to walk, climb ladders and stairs, bend, squat, lift and carry. He told respondent that his knees were worsening because of his job duties, but he was told respondent would not send him to a doctor. The pain became so bad that on February 13, 2009, he went on his own to see Dr. Val Brown, who gave him injections in both his knees. Claimant was later referred

[2] P.H. Trans. at 23.

to Dr. Kenneth Jansson by respondent and was initially seen on June 2, 2009.[3] On that date, claimant gave Dr. Jansson a history of a partial medial and partial lateral meniscectomy on December 27, 2006. Claimant told Dr. Jansson:

> [H]e has always had some pain in his right knee ever since that surgery and claims that he was released a little too soon, but eventually got back into full work. . . . He denies any new injuries to his left or right knee. He has not had any incidents; however, and he just says it is of a repetitive nature.[4]

Dr. Jansson performed arthroscopic surgery on claimant's left knee in December 2009, consisting of a partial meniscectomy and chondroplasty of the medial femoral condyle. Claimant was off work from December 15, 2009, through February 15, 2010, for the surgery on his left knee.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[5]

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[3] The ALJ thereafter authorized Dr. Jansson to treat claimant by Order dated November 3, 2009. That Order was entered in both Docket No. 1,044,973 and Docket No. 1,032,721, but no determination was made as to under which claim the treatment was being ordered. In fact, that Order specifically provided that "[n]o determination [is] presently being made as to responsibility relative to first or second accident."

[4] P.H. Trans., Resp. Ex. 1 at 1.

[5] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[6] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[7] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[8] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[9] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury,

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[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[7] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[8] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[9] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[10]

In *Logsdon*,[11] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,[12] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

The October 10, 2006, injury resulted from a specific trauma to claimant's right knee. Claimant thereafter underwent surgery to his right knee and returned to work for respondent at his regular job. The claim was settled as a scheduled injury based upon a functional impairment to the right leg. Claimant alleges he subsequently injured his left knee by repetitive use performing his regular job duties. He does not allege any specific trauma. Respondent admits claimant's left knee injury is compensable but contends that claimant's subsequent left knee problems resulted from overcompensation for the previously injured right knee and, therefore, claimant is limited to receiving only medical treatment benefits in Docket No. 1,032,721.

Claimant's testimony supports respondent's argument.

> Q. [by claimant's attorney] What kind of work activities at Cereal Food Processors were you doing after August of '08 that was making your knees worse?

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[10] *Id.* at 728.

[11] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

[12] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

A. [by claimant] Milling, my regular job.
Q. And what about milling caused the injury?
A. Pretty much the whole–all the job, period, because you got to do a lot of different stuff, so you just–well, what I figure, to me, when this knee was hurting, then I–when I was hurting with this right knee, I was favoring this left knee.
Q. Right.
A. So when I was still working, they told me my knee was okay, I told the doctor it wasn't, but he sent me back to work anyway, so I did what they told me, I was still hurting on this knee, I was favoring my left, because this one was still hurting, so after a while I was favoring my left so much, after a while it got worser than the right. When I went to Jansson, the left was worser than the right.[13]

Q. [by respondent's attorney] So if I'm understanding you, the pain never stopped in your right knee, so you felt that it was necessary to put most of your weight on your left knee?
A. [by claimant] I think that's true, I mean I had to walk, I had to do the job. If I wanted a job, I still had to do the job, don't make no difference if my knee was hurting or not, or they would have said, we can't use you . . . .[14]

However, the nature of claimant's work is such that a knee injury is predictable even absent a specific trauma or overcompensation for a prior injury.

Q. [by claimant's attorney] Let's talk about the different things you do on your job; first off, do you stand all day?
A. [by claimant] Oh, yes.
Q. Do you ever have the opportunity to sit?
A. You get breaks every now and then.
Q. But while you are doing your job, it's constantly standing?
A. Oh, yeah, you can't sit down and do the job.
Q. Do you have a lot of walking involved?
A. Walking, ladders, stairways, bending, squatting, picking up, just as a miller, you do everything, I mean it's just a repetitive job, period, you know, you got so many things, I could name a whole bunch.
Q. Go ahead, that's what we need here.
A. Well, you got these big 50-pound bags, maybe 65, what you put in bulk, you got a pallet full, about 50 skids, you got different enrichments on the flour . . . .[15]

Dr. Jansson relates claimant's left knee injury to work, but the record does not contain an expert medical opinion on the causation question as between the two docketed claims–that is, whether claimant's left knee injury is a direct and natural consequence of

[13] P.H. Trans. at 8-9.

[14] P.H. Trans. at 23.

[15] P.H. Trans. at 9.

his right knee injury or whether it is the result of repetitive traumas after claimant's return to work following his right knee surgery, or both. There is no evidence that claimant would have suffered these injuries and aggravations had he not been working. It was the nature of claimant's work, not activities of daily living, that caused his knees to worsen and caused his need for surgery of his left knee. Therefore, the left knee should be compensated as a new series of accidents and repetitive trauma injuries.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[17]

CONCLUSION

Claimant's left knee injury is the result of a new series of work-related accidents and repetitive traumas that were separate from and subsequent to his October 10, 2006, right knee injury. Claimant's left knee injury is not a direct and natural consequence of his right knee injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated March 12, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Sylvia B. Penner, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

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[16] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[17] K.S.A. 2009 Supp. 44-555c(k).